Supreme Court No. S123808

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

ZERLENE RICO, et al.,	)	Supreme Court No. S123808
Plaintiffs and Appellants,	)	Court of Appeal Fourth Appellate District Division Two [Case No. E033616]
vs.	)	
MITSUBISHI MOTORS CORPORATION, et al.,	)	San Bernardino County Superior Court [No. RCV 39233]
Defendants and Respondents.	)	[Honorable Ben T. Kayashima, Judge]

APPLICATION OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. FOR LEAVE TO FILE AMICUS CURIAE BRIEF ON THE MERITS IN SUPPORT OF DEFENDANTS/ RESPONDENTS MITSUBISHI MOTORS CORPORATION, ET AL., AND AMICUS CURIAE BRIEF

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vs.	)	Division Two
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	)	San Bernardino
	)	County
	)	Superior Court
Defendants and Respondents.	)	[No. RCV 39233]
	)	
	)	[Honorable Ben T.
	)	Kayashima, Judge]
_____	)	

APPLICATION OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. FOR LEAVE TO FILE AMICUS CURIAE BRIEF ON THE MERITS IN SUPPORT OF DEFENDANTS/ RESPONDENTS MITSUBISHI MOTORS CORPORATION, ET AL.

To the Honorable Chief Justice of the California Supreme Court:

Pursuant to Rule 29.1(f) of the California Rules of Court, The Product Liability Advisory Council, Inc. (the "Advisory Council") requests permission to file the annexed Amicus Curiae Brief On the Merits

in the above matter supporting the position of defendants/respondents MITSUBISHI MOTORS CORPORATION, et al.

Identity and Interest of Amicus Curiae

The Advisory Council is a non-profit corporation with over 125 corporate members representing a broad range of American and international manufacturers.[1] (In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (i.e., non-voting) members.) It seeks to contribute to the improvement and reform of law in the United States and elsewhere with emphasis on the law governing product liability. To that end it submits amicus curiae briefs in cases involving significant issues affecting the law of product liability, to present the broad perspective of product manufacturers seeking fairness and balance in the development and application of that law.

The Advisory Council's interest here derives from the fact this case involves an issue of impor-

[1] The corporate members of the Advisory Council are listed in the Appendix to this application.

tance to product liability litigation: Whether the inadvertent recipient of a document or other material that is privileged should be required to respect its confidentiality and take appropriate action to remedy the error (a course suggested by State Compensation Insurance Fund v. WPS, Inc. (1999) 70 Cal.App.4th 644), or may exploit the situation to his or her advantage (a course allegedly deriving some comfort from language in Aerojet-General Corporation v. Transport Indemnity Insurance (1993) 18 Cal.App.4th 996).

That question is of considerable significance to product liability law. In an era of massive document productions and widespread use of electronic data and communications, it is impossible to totally prevent incidents of the kind in question. To view such unavoidable incidents as a windfall for the inadvertent recipient would disserve the interests of justice. Such a view not only would undermine important privileges and be grossly unfair, but would seriously impair the efficiency of the discovery process as responding parties struggled to lessen the risk of such windfalls.

Simply put, proper resolution by this Court of

the issues posed will have a substantial impact on product liability litigation, and on the fair, efficient and cost-effective resolution of product liability claims, thus invoking the Advisory Council's interest and concern.

The Advisory Council's membership includes many large companies particularly experienced with the problems posed by an overwhelming volume of discovery and the difficulties of dealing with massive discovery productions, including the risk that privileged material will be inadvertently produced. The Advisory Council therefore is uniquely situated to provide guidance for the Court on the issues posed here.

Need for Additional Argument

The Advisory Council is familiar with the issues involved in this case and the scope of their presentation. Its attorney has obtained and reviewed, inter alia, the public versions of the Opening Brief On the Merits of plaintiffs/appellants ZERLENE RICO, et al., and the Answer Brief of defendants/respond-

ents MITSUBISHI. The Advisory Council believes there is a need for additional argument to apprise the Court of matters essential to the Court's informed consideration of the issues before it.

The Advisory Council desires to focus on the broader aspects of the case in terms of relevant legal doctrine and policy so that this Court may be more fully apprised of considerations bearing on the important questions of law presented. In particular, the Advisory Council will focus on the broad policy implications of the choice of doctrine confronting this Court in the context of contemporary discovery practice, and the need to give due regard to those policy concerns. The points this amicus proposes to address, as more fully articulated in the annexed Brief, are:

1. Why the philosophy of State Fund, requiring the inadvertent recipient of privileged material to honor its confidentiality and act to remedy the occurrence, not exploit it, accords with sound policy;

2. Why, consistent with those policy considerations, inadvertent disclosure should not be deemed to waive a document's privileged character;

3. Why this Court should not circumscribe the recipient's obligations by fashioning limitations divorced from the policy interests at stake;

4. How this Court should establish guidelines calculated to remedy the inadvertence and foreclose its exploitation; and

5. Why, when the inadvertent recipient's failure to fulfill the above obligations otherwise would prejudice another party, disqualification is appropriate.

The Advisory Council believes that presentation of these points by means of an amicus brief will aid the Court in making its determination in that they focus on facets of the questions of law under review that have not been fully treated by the parties. The above questions are relevant to the disposition of the issues in this case, in that they go to the heart of the present dispute over the disqualification of plaintiffs' attorneys: What are the obligations of an attorney who receives privileged material through another's inadvertence?

The Present Application Is Timely

The parties' briefing is not yet complete. Defendants/respondents Mitsubishi lodged their Answer Brief with a request that it be filed under seal. That request has not yet been acted on, so the Answer Brief is not yet filed and plaintiffs/appellants have not yet submitted their Reply Brief. Therefore this application (and the annexed amicus brief) are being submitted within the time provided by Rule 29.1(f) of the California Rules of court.

WHEREFORE, The Advisory Council requests that it be granted leave to file the annexed amicus curiae brief with this Court.

DATED: March 30, 2005

Respectfully submitted,

HARVEY M. GROSSMAN
Attorney for The Product Liability Advisory Council, Inc., Amicus Curiae

APPENDIX TO APPLICATION

CORPORATE MEMBERS OF
THE PRODUCT LIABILITY ADVISORY COUNCIL, INC.

3M
Altec Industries
Altria Corporate Services, Inc.
American Household, Inc.
American Suzuki Motor Corporation
Amgen Inc.
Andersen Corporation
Anheuser-Busch Companies
Appleton Papers, Inc.
Arai Helmet, Ltd.
Astec Industries
Aventis Pharmaceuticals, Inc.
BASF Corporation
Bayer Corporation
Beretta U.S.A. Corp.
BIC Corporation
Biro Manufacturing Company, Inc.
Black & Decker (U.S.) Inc.
BMW of North America, Inc.
Boeing Company
Bombardier Recreational Products
BP America Inc.
Bridgestone Americas Holding, Inc.
Briggs & Stratton Corporation
Bristol-Myers Squibb Company
Brown-Forman Corporation
CARQUEST Corporation
Caterpillar, Inc.
Chevron Corporation
Continental Tire North America, Inc.
Cooper Tire and Rubber Company
Coors Brewing Company
Crown Equipment Corporation
DaimlerChrysler Corporation
Deere & Company
Diageo North America Inc.
The Dow Chemical Company
E & J Gallo Winery
E.I. Du Pont de Nemours and Company
Eaton Corporation
Eli Lilly and Company
Emerson Electric Co.
Engineered Controls International, Inc.

Estee Lauder Companies
Exxon Mobil Corporation
FMC Corporation
Ford Motor Company
Freightliner LLC
General Electric Company
General Motors Corporation
GlaxoSmithKline
The Goodyear Tire & Rubber Company
Great Dane Limited Partnership
Guidant Corporation
Harley-Davidson Motor Company
Harsco Corporation
The Heil Company
Honda North America, Inc.
Hyundai Motor America
ICON Health & Fitness, Inc.
Illinois Tool Works, Inc.
International Truck and Engine Corporation
Isuzu Motors America, Inc.
Johnson & Johnson
Johnson Controls, Inc.
Joy Global Inc., Joy Mining Machinery
Kawasaki Motors Corp., U.S.A.
Kia Motors America, Inc.
Koch Industries
Kolcraft Enterprises, Inc.
Kraft Foods North America, Inc.
Lincoln Electric Company
Masco Corporation
Mazda (North America), Inc.
McNeilus Truck and Manufacturing, Inc.
Medtronic, Inc.
Mercedes-Benz of North America, Inc.
Michelin North America, Inc.
Miller Brewing Company
Mine Safety Appliances Company
Mitsubishi Motors North America, Inc.
Nintendo of America, Inc.
Niro Inc.
Nissan North America, Inc.
Novartis Pharmaceuticals Corporation
Occidental Petroleum Corporation
PACCAR Inc.
Panasonic
Pentair, Inc.
Pfizer Inc.
Pharmacia Corporation
Porsche Cars North America, Inc.

PPG Industries, Inc.
Purdue Pharma L.P.
Putsch GmbH & Co.KG
The Raymond Corporation
Raytheon Aircraft Company
Remington Arms Company, Inc.
Rheem Manufacturing
RJ Reynolds Tobacco Company
Schindler Elevator Corporation
SCM Group USA Inc.
Shell Oil Company
The Sherwin-Williams Company
Smith & Nephew, Inc.
Snap-On Incorporated
Sofamor Danek
St. Jude Medical, Inc.
Sturm, Ruger & Company, Inc.
Subaru of America, Inc.
Synthes (USA)
Terex Corporation
Textron Inc.
Thomas Built Buses, inc.
TK Holdings
The Toro Company
Toshiba America Incorporated
Toyota Motors Sales, USA, Inc.
TRW Automotive US LLC
Tyson Foods, Inc.
UST (U. S. Tobacco)
Volkswagen of America, Inc.
Volvo Cars of North America, Inc.
Vulcan Materials Company
Water Bonnet Manufacturing, Inc.
Watts Water Technologies, Inc.
Whirlpool Corporation
Wyeth
Yamaha Motor Corporation, U.S.A.
Yokohama Tire Corporation
Zimmer, Inc.

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MITSUBISHI MOTORS CORPORATION, et al.,	San Bernardino County Superior Court [No. RCV 39233]
Defendants and Respondents.	[Honorable Ben T. Kayashima, Judge]

AMICUS CURIAE BRIEF ON THE MERITS OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC.

Issues as Framed in Petition for Review

"I. In light of the now utterly conflicting published appellate court decisions, what is the status of the law regarding inadvertently received documents, and does the fact that the document does not appear

privileged change the result?

"II. Given that the 'absolute' work-product privilege already has certain judicial exceptions, should an additional exception be recognized where an inadvertently received document evidences potential perjury?

"III. When, if ever, can the ultimate sanction of disqualification be applied where an attorney relied upon uncriticized, published case law in making a decision about an ethical dilemma?"

Identity and Interest of Amicus Curiae

The Advisory Council is a non-profit corporation with over 125 corporate members representing a broad range of American and international manufacturers. (In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (i.e., non-voting) members.) It seeks to contribute to the improvement and reform of law in

the United States and elsewhere with emphasis on the law governing product liability. To that end it submits amicus curiae briefs in cases involving significant issues affecting the law of product liability, to present the broad perspective of product manufacturers seeking fairness and balance in the development and application of that law.

The Advisory Council's interest here derives from the fact this case involves an issue of importance to product liability litigation: Whether the inadvertent recipient of a document or other material that is privileged should be required to respect its confidentiality and take appropriate action to remedy the error (a course suggested by State Compensation Insurance Fund v. WPS, Inc. (1999) 70 Cal.App.4th 644), or may exploit the situation to his or her advantage (a course allegedly deriving some comfort from language in Aerojet-General Corporation v. Transport Indemnity Insurance (1993) 18 Cal.App.4th 996).

That question is of considerable significance to product liability law. In an era of massive document productions and widespread use of electronic data and communications, it is impossible to totally

prevent incidents of the kind in question. To view such unavoidable incidents as a windfall for the inadvertent recipient would disserve the interests of justice. Such a view not only would undermine important privileges and be grossly unfair, but would seriously impair the efficiency of the discovery process as responding parties struggled to lessen the risk of such windfalls.

Simply put, proper resolution by this Court of the issues posed will have a substantial impact on product liability litigation, and on the fair, efficient and cost-effective resolution of product liability claims, thus invoking the Advisory Council's interest and concern.

The Advisory Council's membership includes many large companies particularly experienced with the problems posed by an overwhelming volume of discovery and the difficulties of dealing with massive discovery productions, including the risk that privileged material will be inadvertently produced. The Advisory Council therefore is uniquely situated to provide guidance for the Court on the issues posed here.

Nature of the Case

Plaintiffs filed consolidated product liability actions against defendants MITSUBISHI MOTORS CORPORATION, et al. (Op. 2-3)[2] Following a deposition, plaintiffs' attorney was the inadvertent recipient of a privileged document subject to absolute protection as confidential attorney work product. (Op. 3-6, 17) Plaintiffs' counsel did not notify defense counsel of the incident and instead examined the document and later used it to impeach the testimony of a defense expert. (Op. 3-5) Upon discovering what had occurred, defendants moved to disqualify plaintiffs' counsel, and the trial court granted the motion. (Op. 5-6) Plaintiffs appealed.

The Court of Appeal affirmed. In doing so the court, following doctrine adopted in State Compensation Insurance Fund v. WPS, Inc. (1999) 70 Cal.App. 4th 644 (and rejecting any arguably contrary implications in Aerojet-General Corporation v. Transport Indemnity Insurance (1993) 18 Cal.App.4th 996) concluded that in examining and using the privileged

[2] "Op." references are to the pertinent pages of the Court of Appeal's opinion, annexed to the petition for review.

document, rather than refraining from further reading of it and notifying defense counsel of its receipt, plaintiffs' counsel had breached his ethical duties. (Op. 17-28) The Court of Appeal further concluded that the trial court had not abused its discretion in determining that disqualification was necessary to ensure a fair trial. (Op. 28-32)

Plaintiffs petitioned this Court for review, which was granted.

SUMMARY OF ARGUMENT

In the interests of sound policy, this Court should adopt (with appropriate refinements) the ethical duties promulgated in State Compensation Insurance Fund vs. WPS, Inc. (1999) 70 Cal.App.4th 644, whereby the inadvertent recipient of a document or other material that is privileged must honor the privilege and take appropriate steps to remedy the error.

In an age of massive discovery productions and voluminous data stored and transmitted electronical-

ly, inadvertent receipt of privileged material is an inevitable, unavoidable, fact of life. To permit exploitation of such instances not only would undermine the privileges and frustrate their policies, but would be fundamentally unfair.

Moreover, unless assured that such inadvertent receipt will not be exploited, parties responding to discovery requests would be required to engage in tremendously costly and time-consuming screening efforts that would bring the discovery process to a virtual standstill. The proposed ethical duties therefore serve an important practical goal: preserving a manageable and reasonably efficient discovery process.

In fashioning its guidelines, this Court should not impose artificial limitations on the recipient's duties (e.g., by confining them to a particular privilege, or to formally labeled documents) but should make those duties broad enough to fully serve the policy interests at stake. The Court also should make clear that while non-examination and notice are essential, the ultimate goal is to arrange for the privileged material's safe return.

Finally, to insure that its guidelines have real

meaning, the Court should provide for suitable redress if those guidelines are ignored. In particular, where the recipient attorney's failure to meet his or her obligations would give the attorney an unfair advantage, disqualification should be deemed appropriate to insure a fair trial.

ARGUMENT

I. THE INADVERTENT RECIPIENT OF A DOCUMENT OR OTHER MATERIAL PROTECTED AS PRIVILEGED[3] SHOULD BE REQUIRED TO RESPECT ITS CONFIDENTIALITY AND TAKE APPROPRIATE STEPS TO REMEDY THE ERROR.

A. There Are Compelling Policy Reasons For Requiring The Inadvertent Recipient Of A Privileged Document Or Other Material To Honor Its Confidentiality And Act To Remedy The Occurrence, Not Exploit It.

In providing guidance as to the obligations of

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[3] As used in this brief, references to privileged material encompass documents or other material protected under the work product doctrine. See discussion at Point IC1.

an attorney who receives a privileged document or other privileged material due to another's inadvertence, this Court must choose between two very different approaches. The first, consistent with the philosophy of State Compensation Insurance Fund v. WPS, Inc. (1999) 70 Cal.App.4th 644[4], would require the recipient to pursue the ethical "high ground" by avoiding further examination, notifying the privilege-holder, and --- absent a genuine issue as to the predicate facts (e.g., whether the document is privileged) that may require further discussion or judicial guidance --- arranging for its safe return. The second approach, arguably deriving some comfort from Aerojet-General Corporation v. Trans-

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[4] "When a lawyer who [sic] receives materials that obviously appear to be subject to an attorney-client privilege or otherwise clearly appear to be confidential and privileged and where it is reasonably apparent that the materials were provided or made available through inadvertence, the lawyer receiving such materials should refrain from examining the materials any more than is essential to ascertain if the materials are privileged, and shall immediately notify the sender that he or she possesses material that appears to be privileged. The parties may then proceed to resolve the situation by agreement or may resort to the court for guidance with the benefit of protective orders and other judicial intervention as may be justified. We do, however, hold that whenever a lawyer ascertains that he or she may have privileged attorney-client material that was inadvertently provided by another, that lawyer must notify the party entitled to the privilege of that fact." State Fund, 70 Cal.App.4th 644, 656-657.

port Indemnity Insurance (1993) 18 Cal.App.4th 996, would allow the recipient to remain silent and permit exploitation of the document, though Aerojet itself suggests that exploitation be confined to the "nonprivileged" information in the document. The Court of Appeal here opted for the first, or "ethical high ground", approach. Viewed in terms of sound policy, there are cogent reasons why this Court should do likewise and frame its opinion accordingly.

1. In an Era of Massive Document Productions and Electronic Data and Communications, Imposing An Ethical Duty of Safe Return Is Essential to a Fair and Manageable Discovery Process.

In fashioning the ethical obligations of an attorney who inadvertently receives a privileged document or other privileged material, the Court should take due account of the reality of contemporary discovery practice. A common feature of that practice is a request to produce thousands or tens of thousands -- sometimes even hundreds of thousands -- of documents. Even with the most fastidious

screening -- itself a matter of serious concern, as explained below -- the fallibility inherent in any such endeavor poses not only a risk but a practical certainty that from time to time privileged documents will be produced inadvertently. Any notion that such occasions can be avoided, let alone that this can be accomplished with minimal effort, is divorced from practical reality.

State Fund itself illustrates the problem. The privileged documents there in question were among some 7,000 pages of other documents. See also Kansas-Nebraska Natural Gas Co., Inc. v. Marathon Oil Co. (D.Neb. 1985) 109 F.R.D. 12, 21 (in concluding inadvertent production did not waive privilege, court notes that over 75,000 documents were produced); Trilogy Communications, Inc. v. Excom Realty, Inc. (1994) 279 N.J. Super. 442, 652 A.2d 1273, 1277 (in rejecting claim of waiver by inadvertent production of privileged document, court notes need to consider realities of modern litigation, including volume of documents often required to be produced in complex litigation).

The practical impossibility of avoiding inadvertent receipt of privileged material is compounded by

another key feature of the contemporary scene: the ubiquitous use of increasingly complex electronic devices to store and transmit data. Here human fallibility is enhanced by an increasingly complex array of hardware and software. Indeed, the greatly enhanced risk of inadvertent disclosure stemming from modern technology was cited in the ABA ethics opinion to which State Fund looked for guidance in fashioning its ethics rules. See ABA Formal Ethics Opinion No. 92-368 (Nov. 10, 1992) "Inadvertent Disclosure of Confidential Materials" (ABA/BNA Lawyers Manual On Professional Conduct 1001:155.)

That ethics opinion, which concluded that the receiving lawyer should avoid exploiting the incident and instead seek to remedy the error, noted that the question had become increasingly important "as the burgeoning of multi-party cases, the availability of xerography and the proliferation of facsimile machines and electronic mail make it technologically ever more likely that through inadvertence, privileged or confidential materials will be produced to opposing counsel by no more than the pushing of the wrong speed dial number on a

facsimile machine." Ibid.[5]

With the far more diverse and complex array of electronic devices for storing and transmitting data that have burgeoned during the intervening years, the concerns voiced in the quoted passage are even more apt today. See California Law Review Commission Study K-301, "Waiver of Privilege By Disclosure" (Staff Draft Recommendation) (2004), ("inadvertent disclosure is an increasingly frequent problem due to the use of new technologies such as email and voicemail." Id. at 1; see also Id. at 36, citing such situations as highlighting the need for a proposed codification of the rule that waiver of privilege requires intent to disclose). Moreover, the risk of inadvertent disclosure is likely to increase further as communication technology becomes even more advanced.

The magnitude of the problem is pointed up in the recent Report of the [Federal] Civil Rules Advisory Committee re Proposed Amendments Involving Electronic Discovery (2004) (hereafter the "Advisory Committee Report") which, inter alia, proposes an

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[5] The ABA Opinion suggests the "correct course" for the reviewing lawyer is to inform the sending lawyer and return the documents. Id. at 1001:161.

amendment to Rule 26(b) of the Federal Rules of Civil Procedure (applicable to all discovery, not just electronically stored data), to

> "allow the responding party to assert privilege after production and to require the return, sequestration, or destruction of the material pending resolution of the privilege claim." (Id. at 13)

The report notes "the exponentially greater volume that characterizes electronic data..." Advisory Committee Report, p.2. For example, the backup data used in large corporate computer networks is measured in terabytes, equivalent to hundreds of millions of typewritten pages of plain text. Id. at p.3.

Given the inevitability that inadvertent disclosures will occur, it would be grossly unfair to permit the recipient attorneys to exploit such instances to their advantage. Moreover, allowing exploitation of such instances would seriously dilute the privileges attaching to the materials in question and undermine the important policies those privileges are designed to serve.

Privileges such as those attaching to attorney-

client communications and attorney work product are rooted in practical needs essential to a fair and effective legal system. Making the preservation of privilege a matter of chance would disserve those policy goals. For example, as noted in State fund, the free communication envisaged by the attorney-client privilege would be undermined if the client need fear that any inadvertent disclosure by his counsel could result in exploitation by an adversary. Likewise, an attorney would not feel free to memorialize his or her impressions, as contemplated by the work product privilege, if the risk that inadvertent disclosure would make those impressions available to the opponent hung over his or her head like the sword of Damocles.

Beyond those more obvious considerations lies a further policy concern that goes to the very heart of discovery practice. Even apart from the inadvertent disclosure problem, the party responding to a request for mass production must engage in a laborious, time-consuming process. If the document producer is confronted with the additional prospect that any privileged documents inadvertently produced will become fair game for the opposition, the minute screening and re-screening that inevitably would

follow not only would add enormously to that burden but would slow the pace of discovery to a degree sharply at odds with the general goal of expediting litigation. See Trilogy Communications, Inc. v. Excom Realty, Inc. (1994) 279 N.J. Super. 442, 652 A.2d 1273, 1277 (in concluding inadvertent production did not waive privilege, court cites need to resolve matters quickly and inexpensively), Meese, "Inadvertent Waiver of The Attorney-Client Privilege By Disclosure of Documents: An Economic Analysis" (1990) 23 Creighton L.Rev. 513, 514-515, 537, 540, 543 (in concluding better rule is that inadvertent disclosure does not waive privilege, author observes that alternative approaches "impose unwarranted social costs on attorneys, clients, and society at large"); author notes, inter alia, that expenditure of resources to lessen risk of inadvertent disclosure represents a social cost without any corresponding social benefit); Comment: "Inadvertent Disclosure In The Age of Fax Machines: Is the Cat Really Out of The Bag?" (1994) 46 Baylor L.Rev. 385, 389 (in advocating non-waiver of privilege by inadvertent disclosure, notes that under contrary rule, "attorneys would have to take extraordinary

measures in order to ensure inadvertent disclosures did not occur", which would promote "over-expenditure to avoid waiver." (Footnotes omitted))

The problem is compounded immensely by the widespread use of electronic data storage, with its huge quantities of material and the difficulties posed by the electronic processes themselves. Here, again, the Advisory Committee Report is instructive:

> "The Committee has repeatedly been told that the burden, costs, and difficulties of privilege review are compounded with electronically stored information. The volume of such information and the informality of certain kinds of electronic communications, such as e-mails, make privilege review more difficult, time-consuming, and expensive. Materials subject to a claim of privilege are often difficult to identify, in part because computers may retain information that is not apparent to the reader. Such information may include embedded data (earlier edits that may be hidden from a 'paper' view of the material or the image displayed on a computer monitor) and metadata (automatically created identifying information

about the history or management of an electronic file)." Id. at 8.

Given these circumstances, to confront the producing party with the risk that inadvertent disclosure may make privileged material exploitable by the opposition can add cost and delay to the discovery process for all parties.

> "The volume of electronically stored information responsive to discovery can be extremely great and certain features of such information make it more difficult to review for privilege than paper. The production of privileged material is a substantial risk and the costs and delay caused by privilege review are increasingly problematic." Id. at 12.

Simply put, what is at stake is the manageability and efficiency -- even the continued viability -- of the discovery process itself.

The folly of ignoring that danger is underscored by the ease with which it can be avoided. By requiring the inadvertent recipient of a privileged document or other material to honor the privilege and take appropriate steps to remedy the error, the

producer will be relieved of the enormously time-consuming efforts required to reduce the inadvertent disclosure risk, and the discovery process will proceed in a more timely and cost-effective manner.

Nor are there any legitimate countervailing considerations to warrant the opposite course. Permitting exploitation of inadvertently disclosed material is not needed to foster due regard for privilege on the part of the producing attorney. There are ample other deterrents to any casual disregard of client confidentiality. See, e.g., Cal. Bus. & Prof. Code §6068(e)(1) (attorney has duty "(t)o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.")

As for fostering a level of screening that would somehow eliminate inadvertent disclosure, as explained above that is an impossible and unrealistic goal. Moreover, insofar as the threat of exploitation would serve as an incentive for interminable screening, it would tend to impede the discovery process and therefore should be viewed as a negative, not a positive, in terms of maintaining a workable discovery system.

Any claim that precluding exploitation impairs the search for truth also is without merit. The establishment of the privilege represents a policy decision that any claimed benefits of disclosure are outweighed by other considerations. To argue for exploitation of privileged documents merely because the proposed exploiter accidently receives them is but a thinly disguised assault on the privilege itself, an assault this Court should not countenance.

2. A "Safe Return" Rule Will Serve Other Important Policy Goals.

By insuring that the inadvertent recipient gains no advantage, the Court will avoid the temptation for sharp practice inherent in any rule that allows such advantages. Under a contrary rule, unscrupulous counsel might be encouraged to seek out an opponent's privileged documents or other material in hopes that such efforts would go unnoticed or unproven and the material could be openly exploited as "inadvertently received".

A "safe return" rule also is sound policy simply

because it does represent the ethical "high ground". Requiring attorneys to do what intuitively appears to be the right and honorable thing is in keeping with the vision of a profession that views honorable behavior as a mandate, not an option. See e.g., State Fund, 70 Cal.App.4th 644, 657 (attorney obligation not only to protect client interests but also to respect legitimate interests of other attorneys and the administration of justice). Requiring the inadvertent recipient to proceed in a manner consistent with that mandate not only has intrinsic value per se but also will enhance the public's perception of the profession. Conversely, to sanction a "gotcha" approach would provide grist for those who already view lawyers in an unflattering light.[6]

B. Consistent With The Above Policy Considerations, Inadvertent Disclosure Should Not

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[6] The ABA ethics opinion cited by State Fund suggests that a "safe return" rule also conforms to the obligations imposed on the recipient of missent property under the law of bailments. See ABA Opinion No. 92-368, supra, at 1001:159, noting that the recipient of missent property is viewed as bailee under an implied-in law bailment and therefore obligated to restore the property to its owner.

Be Deemed A Waiver of Privilege.

The very premise of the issue here -- that a privileged document or other privileged material was received through inadvertence -- presupposes that no waiver of privilege was intended. Consistent with the position taken in State Fund, that subjective intent should control and any claim of waiver should be emphatically rejected. See California Law Revision Commission Study K-301, "Waiver of Privilege By Disclosure", supra, proposing codification of the rule of non-waiver absent a subjective intent to disclose.

The policy considerations calling for a duty of safe return apply in the waiver context as elsewhere. Conversely, to permit exploitation on a waiver theory would create the host of problems -- e.g., unfairness, privilege dilution, and unmanageable discovery -- inherent in any theory leading to such exploitation.

Here, again, the issue must be addressed in the context of contemporary discovery practice, in which such factors as massive document productions and electronic technology make unintended disclosures of

privileged documents an inevitable adjunct of the discovery process. As aptly noted in O'Mary v. Mitsubishi Electronics America, Inc. (1997) 59 Cal.App.4th 563, 577, rejecting a claim of waiver based on inadvertent disclosure:

> "Inadvertent disclosure during discovery by no stretch of the imagination shows consent to the disclosure: It merely demonstrates that the poor paralegal or junior associate who was lumbered with the tedious job of going through voluminous files and records in preparation for a document production may have missed something. O'Mary invites us to adopt a 'gotcha' theory of waiver, in which an underling's slip-up in a document production becomes the equivalent of actual consent. We decline. The substance of an inadvertent disclosure under such circumstances demonstrates that there was no voluntary release." [Emphasis the court's]

Adopting a "subjective intent" approach to waiver, and thereby ruling out any claim of waiver by inadvertent disclosure, also serves the interests of administrative efficiency. As reflected in the above-quoted language of O'Mary, subjective intent

provides a clear, bright line standard that minimizes the need for judicial intervention. So long as the disclosure is inadvertent, "waiver" is a non-issue.

The above views find support in the treatment accorded "waiver" claims by other courts and commentators. While (as noted in State Fund) authorities elsewhere have not taken a uniform position on the issue, the better-reasoned cases and commentary have rejected (or urged rejection of) waiver claims in the "inadvertent receipt" scenario. See, e.g., Shriver v. Baskin-Robbins Ice Cream Co., Inc. (D.Colo. 1992) 145 F.R.D. 112, 115; Berg Electronics, Inc. v. Molex, Inc. (D.Del. 1995) 875 F.Supp. 261, 263; Georgetown Manor, Inc. v. Ethan Allen, Inc. (S.D. Fla. 1991) 753 F.Supp. 936, 938; Mendenhall v. Barber-Greene Co. (N.D.Ill. 1982) 531 F. Supp. 951, 954; Kansas-Nebraska Natural Gas Co., Inc. v. Marathon Oil Co. (D.Neb. 1985) 109 F.R.D. 12, 21; Transportation Equipment Sales Corp. v. BMY Wheeled Vehicles (N.D. Ohio 1996) 930 F.Supp. 1187 (waiver approach would "foster and condone sharp practice, distrust, and animosity among lawyers--none of which does anything to accomplish justice

fairly and expeditiously."); Hebert v. Anderson (La.App. 1996) 681 So.2d 29; Corey v. Norman, Hanson & Detroy (1999) 1999 Me. 196, 742 A.3d 933; Trilogy Communications, Inc. v. Excom Realty, Inc. (1994) 279 N.J. Super. 442, 652 A.2d 1273; 3 Weinstein's Federal Evidence (2d ed. 1997) §511.09 (non-waiver by inadvertent disclosure "is the preferred view since it rests on the policy of finding no waiver unless the party intended a waiver."); Meese, "Inadvertent Waiver of The Attorney-Client Privilege By Disclosure of Documents: An Economic Analysis" (1990) 23 Creighton L.Rev. 513, 514 ("no reason for departing from the traditional requirement that a waiver be knowing and intentional.") Comment: "Attorney-Client Privilege: The Necessity of Intent to Waive the Privilege in Inadvertent Disclosure Cases" (1986) 18 Pacific L.J. 59, 93 (should "require the client's corroborated subjective intent to waive the privilege."); Comment: "Inadvertent Disclosure In The Age of Fax Machines: Is The Cat Really Out of The Bag?" (1994) 46 Baylor L.Rev. 385, 397 ("The no waiver analysis, which would require the return of the missent document, appears to be the most advantageous for both ethical and practical

considerations."). See also Redland Soccer Club, Inc. v. Dept. of the Army (3d Cir. 1995) 55 F.3d 827, 856.

Consistent with the above views, this Court should apply a subjective intent standard and rule out waiver as a consideration in the present context.

C. The Court Should Not Circumscribe The Recipient's Obligations By Fashioning Limitations Divorced From The Policy Interests At Stake.

While professing to accept at least some of State Fund's principles, plaintiffs propose a series of qualifications that would eviscerate State Fund's mandates and thwart the policies those mandates aim to serve. This Court should reject those limitations.

1. The Principles Espoused in State Fund Encompass All Privileged Material, Including That Protected Under the Work Product Doctrine.

While suggesting that State Fund's principles might properly be extended (prospectively) to work product, plaintiffs argue that State Fund itself lays down doctrine only for documents protected by the attorney-client privilege. That claim does not bear analysis.

While State Fund involved documents privileged as attorney-client communications, and in reaching its conclusion the Court cited, inter alia, the importance of that privilege, the opinion makes clear that its doctrine is not intended to be confined to that specific privilege. Rather, its rules are couched in terms of privileged documents generally. Thus the Court describes its holding as directed to "the obligation of an attorney receiving privileged documents due to the inadvertence of another. . ." (70 Cal.App.4th 656). Again, in declaring the governing rule, the Court expressly refers not only to materials subject to the attorney-client privilege but also to materials "otherwise" privileged. (Ibid.)

More importantly, the policy considerations underlying the duties State Fund imposes on the inadvertent recipient, and the additional policy

concerns supporting those duties discussed at Point IA, encompass the entire range of privilege.

For example, in the case of work product such as is involved here, those policy considerations are clearly brought into play.[7] As the Court of Appeal aptly notes, the absolute protection accorded work product of the kind in question is rooted in needs basic to the litigation process. Other courts likewise have recognized the importance of protecting work product. See, e.g., Hickman v. Taylor (1947) 329 U.S. 495, 510-511, 67 S.Ct 385, 91 L.Ed. 451 (opening work product to opposing counsel would lead to inefficiency, unfairness and sharp practice, and would have a demoralizing effect on the legal profession); PSC Geothermal Services Co. v. Superior Court (1994) 25 Cal.App.4th 1697, 1708 ("[B]oth the legislature and the courts have deter-

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[7] One commentator has observed: "Although the attorney-client privilege and the work product privilege each have their own set of criteria, the courts tend to treat them similarly in inadvertent disclosure cases involving documents disclosed to the privilege holder's opponent in litigation." Comment: "Inadvertent Disclosure In The Age Of Fax Machines: Is The Cat Really Out of The Bag?" (1994) 46 Baylor L.Rev. 385, 387, n.5. See, e.g., Hebert v. Anderson supra, 681 So.2d 29, 31-32 (in concluding inadvertent disclosure did not waive privilege, court notes document in question protected both under attorney-client privilege and as work product."

mined the attorney-client and work product privileges are fundamental to the justice system."; Id. at 1710: "[T]he Legislature, electorate and courts have held both the attorney-client and work-product privileges in high regard and recognized there are important public policies underlying the privileges which require they be safeguarded.") See also Code of Civil Procedure §2018(c), §2018.030(a) (superseding §2018(c) as of July 2005) (writing reflecting attorney's impressions, conclusions, opinions, or legal research or theories not discoverable under any circumstances). Preserving protection in the face of the inevitable risk of inadvertent receipt is an essential part of respecting that policy choice.

The fairness concerns discussed at Point IA likewise apply to work product. Sanctioning examination and exploitation of a document or other material reflecting the attorney's mental processes would give the inadvertent recipient the very kind of unfair advantage that the State Fund approach aims to prevent.

Again, given the enormous value the privilege-holder would place on protecting the confidentiality

of work product, and the consequent screening burdens that would be imposed to preserve that confidentiality absent a duty of "safe return", the manageability concerns discussed at Point IA are acutely applicable in the work product context.

In sum, the ethical obligation to remedy inadvertent receipt of privileged material should be imposed irrespective of the particular privilege involved.

2. The Recipient's Obligation To Take Corrective Action Should Not Be Conditioned On Formal Labeling of A Document As "Privileged" Or "Confidential".

Plaintiffs suggest that generally there should be no obligation to take corrective action unless a document is formally labeled (e.g., as "work product" here) to reflect its privileged character. Imposing such a precondition would frustrate the policy interests at stake.

First of all, it would compound, rather than alleviate, the manageability concerns discussed at IA. Not only would the document producer have to

engage in a laborious labeling process, it also would have to check and recheck to reduce the risk that a privileged document was not suitably labeled and thereby would lose its protection if it went astray.

A labeling requirement also would raise concerns as to privilege dilution and fairness, particularly in an age of electronic data and mass productions. Even a massive effort could not insure that every privileged document was properly labeled. To treat any missed items that might fall into the hands of an inadvertent recipient as ripe for exploitation would both frustrate the privilege and offend basic notions of fairness.

3. Plaintiffs' Suggestion That The Recipient's Duties Not Commence Unless A Document Is "Obviously" Or "Clearly" Privileged Would Set An Unreasonably High Threshold.

Seizing on some language in State Fund, plaintiffs argue that the inadvertent recipient should be under no ethical obligation unless the document in question is "obviously" or "clearly" privileged.

While State Fund's language is by no means as clear as plaintiffs' argument would suggest[8], the suggestion that the recipient's ethical duties be triggered only if a document is "obviously" or "clearly" privileged does not bear analysis.

Once the recipient suspects or has reason to suspect that he or she has inadvertently received a privileged document or other privileged material, the recipient should be required to avoid further examination and notify the privilege holder. To impose a further or higher threshold for those duties would be an invitation to evade them and disserve the considerations of privilege protection and simple fairness that underlie those duties.

While exploration of the matter with the privilege holder may be in order to clarify the situation, the recipient should not be permitted to act unilaterally in a manner that places the confidentiality of the document or other material suspected to be privileged at risk, or to use any professed doubt

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[8] While State Fund at times refers to materials that "obviously" or "clearly" appear privileged, the court expressly holds that the duty to notify the privilege holder applies when the recipient attorney ascertains that he or she may have inadvertently received privileged material. 70 Cal.App.4th 646.

as a pretext for silence.

That conclusion is underscored when the question is addressed in terms of the respective interests of the parties. A studied examination of the document or other material would per se do violence to its confidentiality and contravene its privileged character, while withholding such examination does not endanger any legitimate interest of the recipient. Likewise, unless notified the privilege holder would have no opportunity to protect its interests, while the giving of notice (e.g., by a mere telephone call) poses no burden on the recipient. Nor can any perceived opportunity for the recipient to better exploit the incident by proceeding clandestinely be viewed as a legitimate interest.

Moreover here, again, account must be taken of the manageability concerns discussed at Point IA. If the producer is confronted with the risk that an inadvertent recipient of a privileged document or other material may avoid remedial efforts on the ground the document's privileged character was not "clear" or "obvious", caution will dictate resort to greatly heightened screening and reduce the flow of discovery to a glacial pace.

D. This Court Should Establish Guidelines For The Inadvertent Recipient Calculated To Remedy The Error and Foreclose Its Exploitation.

Consistent with the above considerations, this Court should clearly delineate the ethical duties of the attorney who inadvertently receives a privileged document or other material.

1. Once an attorney suspects or has reason to suspect that he or she has inadvertently received a privileged document or other privileged material, the recipient should immediately cease reading and promptly notify the privilege holder of what has occurred. These steps conform to the ethical duties mandated by State Fund with the threshold language refined in accordance with the discussion at Point IC3. See also Resolution Trust Corp. v. First of America Bank (W.D.Mich. 1994) 868 F.Supp.217 (inadvertent recipient of privileged document should have notified sender); ABA Model Rules of Professional Conduct (2004 ed.), Rule 4.4(b) (lawyer receiving document lawyer knows or reasonably should know was inadvertently sent should

promptly notify the sender).

2. Arrangements should then be made for the material's safe return to the privilege holder, unless the latter directs some other disposition. See ABA Opinion No. 92-368, supra (suggesting recipient should notify the sending lawyer and abide by the latter's instructions). See also Transportation Equipment Sales Corp. v. BMY Wheeled Vehicles, supra, 930 F.Supp.1187 (court orders return of document inadvertently provided during discovery); Corey v. Norman, Hanson & Detroy, supra, 1999 ME 196, 742 A.2d 933 (recipient attorney should return document). State Fund suggests that following notification of the privilege holder, the matter should be resolved by agreement of counsel or, if needed, with judicial intervention. While that would be the appropriate procedural sequence, further guidance is in order to insure that those discussions of counsel and decisions of the trial court are properly informed. Simply put, and consistent with the policy considerations discussed at Point IA, this Court should make clear that where a privileged document or other privileged material has been inadvertently received, the appropriate

course is to arrange for its safe return. Only where there is a genuine issue as to the basic premise (e.g., whether the document or other material in question is privileged) should there be a need for further resolution by counsel or the court. Conversely, once that premise has been established (whether by agreement or court determination), the duty to return the document or other material to the privilege holder should follow as a matter of course. That duty should not hinge on the whim of the recipient or the discretion of the trial court.

3. To dispel any contrary indications in Aerojet, this Court should make clear that exploitation of the incident by the recipient is proscribed as to the privileged document or other material per se, and that no use may be made of any information contained in it. To permit some "limited" use of the privileged document or other material, or of information contained therein, by the inadvertent recipient would run counter to the basic goal of the State Fund approach! to restore the pre-existing situation as though the inadvertent error had never occurred. Nor is it consistent with the steps outlined in State Fund as essential to achieve that

goal; e.g., the inadvertent recipient's non-examination of the document or other material. To proscribe examination on the one hand, yet allow the benefits of examination on the other, would make no sense. In effect it would reward the recipient for violating an ethical duty.

Moreover, a "limited use" rule would be utterly impractical. The implied assumption that the recipient could or would study the privileged document or other material without absorbing the privileged information it contains, or somehow delete that information from his or her mind and retain only some supposedly nonprivileged information, is divorced from reality.

Nor would such an impractical approach avoid the manageability concerns discussed at Point IA. A document producer, looking at the reality of the situation, would still feel impelled to pursue the kind of interminable screening that the "safe return" approach seeks to avoid.

In sum, if the policies discussed at Point IA are to be served, the required remedial measures must be directed to the privileged document or other material per se.

II. WHERE THE INADVERTENT RECIPIENT'S FAILURE TO FULFILL HIS OR HER OBLIGATIONS OTHERWISE WOULD PREJUDICE ANOTHER PARTY, DISQUALIFICATION OF THE RECIPIENT ATTORNEY IS APPROPRIATE.

If instead of proceeding in accordance with the guidelines described at Point ID, the inadvertent recipient seeks to exploit the incident and thereby acquires knowledge that would give him or her an unfair advantage, disqualification is appropriate in order to insure a fair trial. Once knowledge derived from privileged material has been obtained and absorbed, that knowledge cannot be erased, and if that knowledge would taint the fairness of the proceeding, disqualification is the only practical remedy. See, e.g., County of Los Angeles v. Superior Court (1990) 222 Cal.App.3d 647, 658 ("Having become privy to an opposing attorney's work product, there is no way the offending attorney could separate that knowledge from his or her preparation of the case.") See also General Accident Insurance Co. v. Borg-Warner Acceptance Corp. (Fla.App.1986) 483 So.2d 505 (trial court inadvertently forwarded to

opposing counsel a file produced for in camera inspection; recipient reviewed the file, which contained work product; recipient attorney disqualified). For example, where the recipient attorney's review of a work product document provides insight into the opponent's trial strategy, the resulting unfair prejudice presents a compelling case for disqualification.

Moreover, the threat of potential disqualification is needed to give real teeth to the ethical duties in question and help deter any inclination to disregard or evade them. Given the important policies underlying those duties, and the magnitude of the dangers if those duties are ignored, mere wrist-slapping will not suffice. Confronted with the risk of disqualification, even those less sensitive to ethical commands will be more likely to pay heed.

Nor can the threat of disqualification be viewed as unduly harsh. Since that threat readily can be avoided by adhering to the ethical guidelines in question, there if no cause for concern as to the impact of disqualification on the offending attorney. As for the impact on the offending counsel's

client, that impact is outweighed by the unfair prejudice that otherwise would be suffered by the privilege holder. More generally, as aptly stated in People ex rel. Department of Corporations v. Spee Dee Oil Change Systems, Inc. (1999) 20 Cal.4th 1135, 1145:

> "The paramount concern must be to preserve public trust in the scrupulous administration of justice and the integrity of the bar. The important right to counsel of one's choice must yield to ethical considerations that affect the fundamental principles of our judicial process."

CONCLUSION

Considerations of fairness and sound policy dictate that the inadvertent recipient of privileged material be enjoined to respect its confidentiality

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and act to remedy, not exploit, the error. This Court should frame its opinion accordingly.

Respectfully submitted,

Of Counsel

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CERTIFICATE OF WORD COUNT

Counsel hereby certifies that the text of this brief consists of 6,571 words (as counted by the word count feature on the computer program used to generate the brief), excluding the title page, tables of contents and authorities, and this certificate.

DATED: March 30, 2005

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PROOF OF SERVICE

I am a citizen of the United States, over 18 years of age, not a party to this action and employed in Los Angeles, California. I am an active member of the State Bar of California. My business address is 500 North Highland Avenue, Los Angeles, California 90036.

On March 30, 2005, I served the attached Application for Leave to File Amicus Curiae Brief and Amicus Curiae Brief on the interested parties to this action by placing true and correct copies thereof enclosed in sealed envelopes with postage thereon fully prepaid in the United States mail at Los Angeles, California, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration is executed on March 30, 2005 at Los Angeles, California.

_____

HARVEY M. GROSSMAN